83-248

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

Petitioner,

—v.—

JAY EDWARDS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

1. Can a $469,462 damage award—which the court of appeals conceded to be speculative—be sustained when trial counsel filed a timely challenge to the legal sufficiency of the damage evidence in a new trial motion, on the sole ground that no objection had been made to the admissibility of the damage exhibit when it was originally offered?

Statement Pursuant to Rule 28.1

Subsequent to the commencement of the action, Petitioner New England Toyota Distributor, Inc. changed its name to New England Distributors, Inc. and then to Butler Industries, Inc. Petitioner has no parent or subsidiaries. Its principal stockholder, Mr. George A. Butler, owns a substantial interest in Ecocar, Inc., the parent of Econo-Car International, Inc.

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New England Toyota Distributor, Inc. ("NET") respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, entered May 19, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, affirming in part and reversing in part the judgment of the United States District Court for the District of New Hampshire, is reported at 708 F.2d 814 (Pet. App. 1a).[1] The district court's judgment on a jury verdict is unreported

[1] The citation "Pet. App. ____" refers to the appendix to this petition.

(Pet. App. 19a). The order of the district court denying NET's motion for a new trial is unreported (Pet. App. 23a).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1983 (Pet. App. 25a), and this petition was filed within 90 days thereafter. 28 U.S.C. § 2101(c) (1976). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

RULE INVOLVED

This petition involves Rule 59 of the Federal Rules of Civil Procedure, which provides in pertinent part:[2]

> **Rule 59. New Trials; Amendment of Judgments**
>
> **(a) Grounds** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> **(b) Time for Motion** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

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2 The underlying cause of action is based upon N.H. Rev. Stat. Ann. § 357-C (Supp. 1982). Construction of that statute is not involved here since the petition involves a question of federal procedure. We have nonetheless reproduced the pertinent portions of the New Hampshire statute for the Court's convenience (Pet. App. 27a).

STATEMENT OF THE CASE

A. Proceedings Below

On February 10, 1978, Jay Edwards, Inc. ("Edwards") commenced this action against NET and its principal stockholder, George Butler, alleging violations of the Sherman Act, 15 U.S.C. § 1 (1976) (Count I); the Robinson-Patman Act, 15 U.S.C. § 13 (1976) (Count II); the Federal Dealer Day in Court Act, 15 U.S.C. § 1222 (1976) (Count III); the common law of defamation (Count IV); and N.H. Rev. Stat. Ann. § 357-C (Supp. 1982), the New Hampshire equivalent of the Federal Dealer Day in Court Act (Count V). Jurisdiction was based on 28 U.S.C. §§ 1332 & 1337 (1976 & Supp. V 1981).

All but two counts—the Sherman Act claim (Count I) and the claim based on N.H. Rev. Stat. Ann. § 357-C (Supp. 1982) (Count V)—were withdrawn at the conclusion of discovery. The parties proceeded to trial on the two remaining claims on April 6, 1982, in Concord, New Hampshire. A jury trial was held before Senior Judge Irving Hill of the United States District Court for the Central District of California, sitting by designation. At the close of Edwards' case, Judge Hill directed a verdict dismissing the Sherman Act claim.[3] The New Hampshire claim, however, was submitted to the jury, which found in favor of Edwards and awarded $1,419,462—the precise amount of damages demanded in Edwards' damage theory. Judgment was entered on the jury verdict on April 22, 1982 (Pet. App. 19a), which judgment was amended on June 2, 1982, to include $429,997.37 in prejudgment interest (Pet. App. 21a). The final judgment, therefore, totalled $1,849,459.37.

Pursuant to Fed. R. Civ. P. 59, NET filed a timely motion for a new trial on the ground, *inter alia*, that plaintiff's damage theory was irrational and speculative. The district court denied the motion on May 17, 1982, without any ex-

3 The directed verdict had the effect of dismissing George Butler as a defendant since he was not named in the only remaining count.

planation of its reasons therefor (Pet. App. 23a). NET appealed from the denial of its new trial motion as well as from the final judgment.[4]

The court of appeals overturned the major portion of the jury award, covering the period after March 8, 1978 when NET ceased to be Edwards' supplier. 708 F.2d at 822-23 (Pet. App. 11a-13a). It nevertheless upheld, in its entirety, the $469,462 damage award for the earlier period from April 1, 1976 to March 7, 1978 when NET was Edwards' supplier. 708 F.2d at 819-22 (Pet. App. 5a-10a).

B. The Holding of the Court of Appeals

While the court of appeals declined to vacate the jury award of damages for the period when NET was Edwards' supplier, it was clearly troubled by the speculative nature of Edwards' damage theory. Repeatedly the court expressed the view that the award of damages for this period was "exceedingly generous", 708 F.2d at 822 (Pet. App. 10a); that Edwards "may . . . have been overgenerous to itself" in calculating its damages, 708 F.2d at 820 n.5 (Pet. App. 7a); and that "[t]he award reflects annual profits proportionately far greater than Edwards ever made. . . ." 708 F.2d at 819 (Pet. App. 5a). Indeed, the court went so far as to say that: "Were we to write on a clean slate, we might find merit to NET's contentions." 708 F.2d at 819 (Pet. App. 5a).

The court of appeals ruled, however, that "[m]ere generosity of an award . . . does not justify an appellate court in setting it aside. . . ." 708 F.2d at 819 (Pet. App. 6a). The court held that notwithstanding NET's timely new trial motion based on the insufficient *weight* of the evidence, a new trial was "barred by NET's failure to object" to the *admissibility* of Edwards' damage exhibit, 708 F.2d at 819 (Pet. App. 6a):

> "NET argues that Edwards's [sic] damages calculations relied so heavily on groundless assumptions and were so irrational that the jury should not have been allowed to

4 NET's present counsel was substituted for trial counsel on appeal.

> use them. However, the calculations were introduced and described at trial without any objection from NET. At no time was it asserted that the data and suppositions therein—some of which are now attacked as without support in the record—were in fact entirely unsupported and hence inadmissible for the jury's consideration. Nor was it ever put to the judge, while the trial progressed, that plaintiff's damages calculations, all of which were gathered in a single exhibit, were too inaccurate, incorrect, or irrational, as a matter of law, to form the basis of a supportable jury award." 708 F.2d at 819 (Pet. App. 6a) (citations omitted).

Time after time, the court of appeals indicated its agreement with NET's contentions, only to hold that arguments addressing the weight of the evidence could not be raised in a new trial motion in the absence of a trial objection to the admissibility of the evidence.

For example, the court pointed out that although "[t]he accuracy of [Edwards' damage exhibit] obviously turns on whether income from parts, service, etc., rises in direct relation to new car sales . . . [t]here was little evidence that this was so. . . ." 708 F.2d at 819-20 (Pet. App. 6a-7a). However, the court held that this was "[a]n example of an argument *barred* by NET's failure to object below. . . ." 708 F.2d at 819 (Pet. App. 6a) (emphasis added).

At another point, the court described as "sparse" the evidence supporting the critical assumption that Edwards should have been offered or could have sold 300 additional cars annually. 708 F.2d at 820 (Pet. App. 8a). Notwithstanding NET's timely new trial motion, the court held:

> "Both these assumptions were incorporated in the plaintiff's exhibit calculating damages and, as noted, there was never any objection that these or any other assumptions in the exhibit lacked a factual predicate sufficient to permit the jury to weigh the exhibit itself." 708 F.2d at 820 (Pet. App. 7a-8a).

On no fewer than seven separate occasions, the court emphasized the absence of objection as its reason for leaving the $469,462 damage award undisturbed for the period when NET still served as Edwards' supplier. 708 F.2d at 819, 820, 821, 822 (Pet. App. 6a, 7a, 8a, 10a).[5]

The court's ultimate conclusion was that a timely new trial motion was too late to raise a challenge to the speculative nature of a damage award. As the court put it: "[NET cannot] complain that that evidence was legally unacceptable when it did not raise that objection at trial." 708 F.2d at 822 (Pet. App. 10a).

C. Statement of Facts

Edwards is a Toyota dealer in Portsmouth, New Hampshire. Prior to March 8, 1978, NET was the regional Toyota distributor for New England and served as Edwards' supplier.

Edwards based its claim of liability on alleged acts of discrimination in the allocation of cars by NET. Edwards' theory at trial was that NET had favored Bill Dube, Inc. ("Dube"), a nearby Toyota dealer, in the allocation of cars and that, because of alleged similarities between the two dealerships, Edwards should have received allocations equal to those given Dube.[6]

Edwards claimed that the impact of this alleged discrimination was that Edwards received hundreds of fewer cars than it

5 It is significant that in overturning the jury award for the period after March 8, 1978, the court of appeals placed heavy emphasis on the fact that NET moved at trial to strike all evidence relating to that period. 708 F.2d at 822-23 (Pet. App. 11a). This is a further indication that the court relied on the absence of an objection as the basis for sustaining the $469,462 in damages for the prior period.

6 NET maintained throughout the trial and on appeal that Edwards had received the correct number of vehicles to which it was entitled, according to a mathematical formula applicable to all dealers, and that Dube's higher allocations were attributable to Dube's superior sales performance and lower inventory.

should have, and that this resulted in a loss of profits. Edwards presented its calculation of lost profits in a 19-page damage exhibit, which was introduced at trial without objection.

Edwards' damage theory assumed that Edwards should have received 171 additional cars in the last nine months of 1976, 267 in 1977, and 49 in the first two months of 1978.[7] While nearly all of Edwards' damage assumptions were untenable, including the number of cars it claimed it would have sold, the speculative nature of the damage theory is brought home by the astonishing profit Edwards claims it could have made on sales of these additional 487 cars. Edwards' damage theory assumed, without any supporting evidence, that projected increases in new car sales would increase not only profits on the sale of *new* cars—but would increase in direct one-to-one correlation the profits on the sale of *used* cars, parts and service as well. In this manner, the damage theory was able to project a 622% increase in profits on a 93% increase in sales in 1976; a 273% increase in profits on a 70% increase in sales in 1977; and a 537% increase in profits on an 82% increase in sales in 1978.

The lost profit calculations are diametrically opposed to Edwards' real world experience *as revealed in the damage exhibit itself*. The following chart illustrates the glaring discrepancy:[8]

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7 These numbers were computed by assuming that NET should have offered Edwards the same number of cars per month as Dube—an additional 25 cars per month—and reducing that amount by the percentage of cars Edwards refused to accept from NET in the real world. The damage theory then assumed that Edwards would have sold every additional car which it was offered, notwithstanding the fact that Edwards turned down scores of cars from NET and complained that because of the number of dealers in its area, it was "extremely difficult, if not impossible, for the dealers to remain profitable" (Plaintiff's Ex. 72).

8 All of the figures appearing in this section come from the damage exhibit itself and are not in dispute.

	Cars Sold	*Net Profit*
1976 Actual	183 actual	$ 28,242 actual
1976 Damage Theory	354 claimed	203,867 claimed
BUT 1977 Actual	382 actual	86,912 actual
BUT 1978 Actual	357 actual	56,385 actual

In 1976, Edwards received 183 cars during the nine-month damage period and earned a net profit of $28,242, according to the damage exhibit. According to Edwards' theory, it should have received 354 cars; and Edwards projects a profit of $203,867 on those 354 cars. In the *real world* Edwards did receive 382 cars in 1977—or 28 more cars than the 1976 projection. Far from making a $203,867 profit, however, Edwards' real world profit was only $86,912. Accordingly, the jury awarded damages to Edwards on the assumption that Edwards could have earned $203,867 on 354 cars in 1976 when in the real world, Edwards earned only $86,912 on 382 cars in 1977.

Edwards' real life profits in 1978 ($56,385 on 357 cars), 1979 ($12,583 on 310 cars) and 1980 ($29,010 on 323 cars) further demonstrate the untenability of Edwards' assumption that it could have earned $203,000 on 354 cars. As the court of appeals itself observed, "[t]he award reflects annual profits proportionately far greater than Edwards ever made or than Dube achieved even with supposedly full allocations." 708 F.2d at 819 (Pet. App. 5a).[9]

Edwards' damage theory further assumes that profits from parts, service and used car sales go up in a direct one-to-one

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9 The court went on to state:

> "Indeed, Edwards's [sic] own earnings history casts doubt on its estimates. For example, Edwards calculates that in the last nine months of 1976 it should have sold 354 cars (rather than 183), and that it would have earned $203,867 (rather than $28,242). Yet in 1977, when Edwards sold 382 cars, its net profit was only $86,000. The following year it sold 357 cars, almost the exact number estimated for the end of 1976, and made $56,000." 708 F.2d at 819 (Pet. App. 5a-6a).

correlation to increases in new car sales (see p. 7, *supra*). The record is devoid of factual support for this critical assumption, however. To be sure, plaintiff's president, Jay Edwards, testified that there is some undefined relationship between new car sales and sales of used cars, parts and service. Nowhere did Mr. Edwards testify, however, that there is a one-to-one correlation, which is the fundamental premise of plaintiff's damage theory.[10] Nor were any financial records introduced to demonstrate the truth of the proposition. Indeed, the court of appeals noted that although "[t]he accuracy of [Edwards' damage

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10 Mr. Edwards' entire testimony relating to this subject is set forth below.

> Q. Mr. Edwards, why or how was Edwards Toyota injured by receiving an allocation of 28 compared to Mr. Dube's 70?
>
> A. The new automobile to the franchise dealer is the oxygen to his survival. Everything in the dealership revolves around the selling of a new car. That is how we develop used car trades, which we sell, that is how we develop parts sales through cars we sell to customers, that is how we develop our service department through customers who come back for service. And until a new car is delivered to a retail customer we have not had the opportunity to develop the process which makes a dealership successful. (Tr I 88-89).
>
> • • • •
>
> Q. Now, Mr. Edwards, that profit, the net profit is not just on the sale of new cars; is it? That includes the entire dealership.
>
> A. That is right. The dealership's profits for each department are computed in here. They're all run off a per new car basis. The total dealership profit is included in this figure. Parts, service, sales. And then all the dealership's expenses is subtracted here; parts, service, sales, to wind up with the net. (Tr III 58-59).
>
> • • • •
>
> Q. Now, that damage report that's been submitted, the profit that is described in there is not based only upon the sale of new cars; is it?
>
> A. Oh, no.
>
> Q. What else is it based upon?
>
> A. The profit per unit, both actual and projected, are based on the total gross profits of the total dealership operation; parts, service, the used cars that come in trade on the new cars. (Tr VIII 95).

exhibit] obviously turns on whether income from parts, service, etc., rises in direct relation to new car sales . . . [t]here was little evidence that this was so. . . ." 708 F.2d at 819-20 (Pet. App. 6a-7a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF OTHER COURTS OF APPEALS

In asserting the failure of NET's trial counsel to object to the introduction of Edwards' damage exhibit as a ground for leaving undisturbed an admittedly speculative damage award, the First Circuit applied a plainly erroneous legal standard. Inexplicably, the court of appeals applied a rule governing the admissibility of evidence to a question concerning the weight of the evidence—a ruling which is directly contrary to the holdings of the Second and Third Circuits, and implicitly at odds with decisions in the Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits as well.

It is black letter law that, although leeway is permitted in the computation of damages, a "jury may not render a verdict based on speculation or guesswork." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946). Where, as here, a jury has awarded damages that are excessive and unwarranted by the evidence, that award must not be allowed to stand. *See, e.g., Alover Distributors, Inc. v. Kroger Co.*, 513 F.2d 1137, 1141-42 (7th Cir. 1975); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91, 95 (2d Cir.), *cert. denied*, 389 U.S. 951 (1967); *Springfield Crusher, Inc. v. Transcontinental Ins. Co.*, 372 F.2d 125, 126 (3d Cir. 1967); *Flintkote Company v. Lysfjord*, 246 F.2d 368, 389 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Whiteman v. Pitrie*, 220 F.2d 914, 919-20 (5th Cir. 1955); *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400, 408-09 (4th Cir. 1948). Refusal to award a new trial under such circumstances constitutes an abuse of discretion. *See, e.g., Lanfranconi*, 376 F.2d at 94; *Springfield Crusher*, 372 F.2d at 126; *Flintkote*, 246 F.2d at 389; *Whiteman*, 220 F.2d at 919-20; *Virginian Ry.*, 166 F.2d at 408-09.

A failure to object to evidence offered at trial is uniformly recognized to mean but one thing—in the absence of plain error, the unobjected-to evidence may be properly admitted and considered by the fact finder. *See* Fed. R. Evid. 103(a)(1). The presence or absence of an objection has absolutely no effect on the weight of the evidence—which is the proper focus of a new trial motion. *See, e.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).[11] Below, the court of appeals recognized that *the damage exhibit itself* proved that Edwards—even when it had the number of cars it claimed in the damage theory—did not come close to achieving the level of profits it claimed. 708 F.2d at 819 (Pet. App. 5a). It stands logic on its head to say that speculative damages become non-speculative by reason of trial counsel's failure to object to the very damage exhibit which proves their speculative nature.

While the court of appeals stated on several occasions that there was some minimal evidence to sustain the damage award, 708 F.2d at 820-21 (Pet. App. 7a-10a), this holding was based exclusively on the fact that NET did not object to the admissibility of the damage exhibit:

> "We conclude, *taking into account plaintiff's unobjected-to damages exhibit*, that there was a sufficient basis in the evidence for the jury's award during the time NET was the regional distributor." 708 F.2d at 821 (Pet. App. 10a) (emphasis added).

This argument is merely a bootstrap, however. It assumes that if a damage theory is in the record, it is, for that reason alone, rationally supported. Under the First Circuit's decision, a new trial on damages could never be awarded, despite the inadequacies of the damage theory, unless the damage evidence was improperly admitted.

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11 "The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving. . . ."

The court of appeals' holding that a new trial was "barred by NET's failure to object" is directly at odds with holdings in the other circuits.

In *Springfield Crusher, Inc. v. Transcontinental Ins. Co.*, 372 F.2d 125 (3d Cir. 1967), the Third Circuit ordered a new trial on damages in an action on an insurance policy, finding that the jury's award of the full amount of the policy limit "was not reconcilable with the evidence. . . ." *Id.* at 126. The court so held despite the fact that the defendant had posed no objection to the plaintiff's improper testimony on the replacement value of the insured equipment. *Id.* at 127 ("This testimony was plainly irrelevant and inadmissible but the defendant interposed no objection to its introduction."). The Third Circuit nonetheless held that the district court's refusal to award a new trial was an abuse of discretion.

In *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1212-13 (2d Cir. 1981), *aff'g* 463 F. Supp. 983, 1019-20 (D. Conn. 1978), *cert. denied*, 455 U.S. 1016 (1982), the Second Circuit affirmed the trial court's overturning of a jury award in favor of SCM because, as here, the damage theory was based upon assumptions that were contrary to historical facts. There, not only did the defendant not object to the damage exhibit upon which the jury had based its award, the defendant itself *introduced* the exhibit. *See* 463 F.Supp. at 1018 ("The jury award of $230,874 was indisputably based on a calculation that Xerox presented."). The Second Circuit nonetheless held that the damage theory lacked a rational foundation and therefore could not be sustained.

It is therefore indisputable that, at least in the Second and Third Circuits, objection at trial is not a prerequisite to overturning speculative damage awards.

That the other circuits likewise do not impose a threshold "objection" requirement for challenging speculative damage awards is apparent from examining the opinions of the courts of appeals where jury awards have been overturned or new trials ordered. We have been unable to find the slightest hint that the courts of appeals' decisions were in any way in-

fluenced by the presence or absence of objection at trial to the introduction of damage exhibits. *See, e.g., Universal Lite Distributors, Inc. v. Northwest Industries, Inc.*, 602 F.2d 1173 (4th Cir. 1979); *McBrayer v. Teckla, Inc.*, 496 F.2d 122, 126-28 (5th Cir. 1974); *Mitchell Coal Company v. United Mine Workers of America*, 313 F.2d 78 (6th Cir. 1963); *Alover Distributors, Inc. v. Kroger Co.*, 513 F.2d 1137 (7th Cir. 1975); *National Wrestling Alliance v. Myers*, 325 F.2d 768, 775-77, 777-78 (8th Cir. 1963) (majority & concurring opinions); *Flintkote Company v. Lysfjord*, 246 F.2d 368, 389-94 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

The conflict created by the First Circuit's contrary holding has implications far beyond mere injustice in the case at bar. Under the First Circuit's rule, no new trials could be granted in the absence of an erroneous evidentiary ruling by the trial judge, since objection to the admissibility of evidence would become a precondition to challenging its weight on a new trial motion. The inevitable effect of such a rule will be to spur frivolous and unnecessary objections at trial. Litigants wishing to challenge damage theories which are not adequately supported will be uncertain whether a court might seize upon a failure to object as basis for denying a new trial based on the insufficient weight of the evidence. Faced with a Hobson's choice of either filing a premature objection or facing possible preclusion on a subsequent motion for a new trial, lawyers will be inclined to object at every turn, which will serve only to disrupt the proceedings and waste scarce judicial resources.

II. THE DECISION BELOW CONFLICTS WITH THE UNAMBIGUOUS PROVISIONS OF FED. R. CIV. P. 59(b)

The First Circuit's holding flies in the face of a plain reading of Fed. R. Civ. P. 59(b), which explicitly provides ten days *after* entry of judgment to make a new trial motion. Nothing in Rule 59 suggests that the right to a new trial, where the verdict is against the weight of the evidence, is conditioned upon an objection at trial. This is to be contrasted with a motion for judgment n.o.v. pursuant to Fed. R. Civ. P. 50(b), which—unlike Rule 59—requires counsel to take action at trial (*i.e.*, move

for a directed verdict) in order to obtain relief. Accordingly, the First Circuit has applied a new legal rule to new trial motions that has no basis in Rule 59. By filing its motion within the time prescribed by Rule 59, NET undeniably preserved its right to challenge the speculative nature of the damage award.

CONCLUSION

For the reasons stated, a petition for a writ of certiorari should be issued to the United States Court of Appeals for the First Circuit.

Dated: August 16, 1983

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Argued Dec. 7, 1982

Decided May 19, 1983

No. 82-1539

JAY EDWARDS, INC.,

Plaintiff, Appellee,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

Defendant, Appellant.

Allen Kezsbom, New York City, with whom Steven Glickstein, and Kaye, Scholer, Fierman, Hays & Handler, New York City, were on brief, for defendant, appellant.

Daniel A. Lauter, Concord, N.H., with whom Myers & Lauter, Concord, N.H., was on brief, for plaintiff, appellee.

Before:

COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

LEVIN H. CAMPBELL, *Chief Judge*.

Jay Edwards, Inc. ("Edwards"), a New Hampshire Toyota dealership, brought this suit in February 1978 against New

England Toyota Distributor, Inc. ("NET"), which at that time was the regional distributor for Toyota. Of the five counts in the original complaint, three were withdrawn by Edwards at the close of discovery. This left a claim under the Sherman Act, 15 U.S.C. § 1, and a pendent state statutory claim alleging bad faith conduct on the part of NET. At the close of the trial, the district court granted a directed verdict for NET on the federal claim. The state claim went to the jury, which returned a verdict for the plaintiff in the amount of $1,419,462, exactly the sum requested. With the addition of prejudgment interest, the award came to $1,849,459.37. NET's motion for judgment n.o.v., new trial, or remittitur was denied, and with new attorneys it appeals from both that denial and the judgment itself.

The claim that went to the jury was based on the New Hampshire equivalent of the federal Automobile Dealers' Day in Court Act. The New Hampshire statute prohibits a distributor from "engag[ing] in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of such parties or the public." N.H.Rev.Stat.Ann. § 357C:3(I). A distributor may not refuse to deliver reasonable quantities of cars to franchised dealers except for reasons beyond its control. *Id.* § 357C:3(III).

At trial, plaintiff presented evidence of a number of allegedly bad faith actions by NET. The most serious of these was an alleged malicious failure to supply Edwards with the number of cars to which it was entitled. Plaintiff also sought to show that NET had deceived it into withdrawing an objection to a competing franchise; that NET had wrongfully accused Edwards of misconduct in a sales promotion; that NET lied when it claimed a number of undelivered cars had been irreparably damaged in a storm; that NET knowingly filed a false complaint against Edwards with the state Attorney General; and that NET had sent a letter terminating

1 After an investigation, the Attorney General refused to take further action, finding that there was no evidence of substantial illegal practices.

Edwards's franchise for reasons it knew were specious. Throughout this period Jay Edwards, plaintiff's president, was also president of the Toyota Dealer Alliance ("Alliance"), an organization of Toyota dealers unhappy with NET, formed to bargain with it. Plaintiff's theory at trial was that NET's harassment was in retaliation for Edwards's activity as president of the Alliance. It introduced evidence tending to show that other members of the Alliance were also harassed by NET.

Plaintiff's damages claim, and its ultimate recovery, rested exclusively on the alleged misallocation of cars. Edwards claimed that beginning in April 1976, immediately after the Alliance had presented NET with a list of demands, NET disregarded its own allocation formula and "shorted" Edwards. From April 1976 through December 1977, Edwards was offered 527 fewer cars (300 per year) than was Bill Dube, Inc., a comparable New Hampshire dealership that theretofore had received identical allocations. Under Edwards's theory, it should have received what Dube had received. Edwards claimed the profits it purportedly lost because of NET's failure to allocate to it the same number of cars offered Dube. Edwards also sought damages for profits it purportedly lost *after* March 8, 1978, the date on which NET ceased to be the regional distributor. According to Edwards, the reduction in sales resulting from NET's machinations caused the new regional distributor to continue to allocate cars at an unjustifiably low rate.

Plaintiff's calculations of lost profits stemming from NET's shorting of cars were first presented in a 22-page document entitled "damage report" filed during pretrial procedures seven months before trial. The same calculations later went into evidence as plaintiff's exhibit 380. The financial records on which the calculations were based, though never introduced into evidence, had been available to NET during discovery. While NET moved before trial to eliminate other evidence proffered by plaintiff, NET did not object to the damage report, and the report was received into evidence without objection.

Edwards calculated damages as follows. First, it reduced the 300 vehicles it believed it should have been offered annually by its acceptance rate (the number of offered vehicles accepted) for each of the relevant years. It then calculated its gross per unit profit for each of the years by dividing the gross profits of the entire dealership by the number of new cars sold. It multiplied the per unit profit by the number of units (actual and hypothetical) it would have sold, then subtracted certain overhead costs. Some overhead items were assumed to be variable and correspond directly with sales volume (e.g., sales commissions); some were assumed to be semi-fixed (e.g., office supplies); and others were calculated as fixed (e.g., rent, owner's salary). This yielded a total net profit figure, from which was subtracted actual net profit to arrive at lost profits for each year.[2]

I. STATUTORY VIOLATION

The thrust of this appeal is directed at the calculation of damages, not the finding of liability. NET denies that there were any deliberate misallocations, which, if strictly true, would preclude a finding of liability as well as damages. But the jury had before it evidence of troubled relations between Edwards and NET, of possible harassment by NET, and of a

[2] For example, the figures for 1977, during which Edwards had an 89 percent acceptance rate, were as follows:

	Actual (382 Cars)		*Projected (649)*		*Increase*
Gross Profit	$474,369	$1241 per unit	$805,928	$1241	$331,559
Selling Expense	50,258	137	84,922	130	34,394
Departmental Operating Expense	154,185	403	199,158	306	44,973
Overhead	181,091	474	196,405	302	15,314
Deductions	1,948	5	1,948	3	0
Net Profit	86,617	226	323,495	498	236,878

sudden and entirely unexplained disparity between the allocations to Edwards and those to Dube immediately after the Alliance issued its list of demands. NET provided at trial no very clear explanation of the disparity in allocations.[1] Based on the evidence presented to it, it was open to the jury to conclude that NET had engaged in "action which is arbitrary, in bad faith, or unconscionable" and had failed to deliver "reasonable quantities" of automobiles in violation of subsections (I) and (III) of N.H.Rev.Stat.Ann. § 357C:3.

II. DAMAGES

The picture as to damages is less clear. From April 1976 through March 1981 Edwards had total net profits of $210,287. It claims that, had it been offered an additional 300 cars per year, its net profits for that period would have been $1,629,749, and that it was accordingly damaged in the amount of $1,419,462. The jury agreed. Appellant strenuously attacks the size of this award, characterizing it as "totally out of proportion to any alleged wrongdoing by NET or any conceivable injury to the plaintiff."

Were we to write on a clean slate, we might find merit to NET's contentions. The award reflects annual profits proportionately far greater than Edwards ever made or than Dube achieved even with supposedly full allocations. Indeed, Edwards's own earnings history casts doubt on its estimates. For example, Edwards calculates that in the last nine months of 1976 it should have sold 354 cars (rather than 183), and that

[1] In an affidavit accompanying a motion for new trial, a former vice president of NET put forward newly discovered computer printouts that he says do explain the disparity. We consider below whether this evidence was such as to compel the granting of a new trial. Here we point out only that the affiant states that "the discrepancy between the two dealers could not be justified without resort to the actual numbers contained in these documents. . . . Plaintiff's contentions regarding misallocations . . . could not effectively be answered without this material." This only supports the rationality of the jury's conclusion—given the evidence presented to it—that NET, in bad faith, preferentially allocated cars to Dube.

it would have earned $203,867 (rather than $28,242). Yet in 1977, when Edwards sold 382 cars, its net profit was only $86,000. The following year it sold 357 cars, almost the exact number estimated for the end of 1976, and made $56,000.

Mere generosity of an award, however, does not justify an appellate court in setting it aside, and we cannot say that the award here, for the period of NET's distributorship, exceeds "any rational appraisal or estimate of the damages that could be based upon evidence before the jury." *Glazer v. Glazer*, 374 F.2d 390, 413 (5th Cir.), *cert. denied*, 389 U.S. 831, 88 S.Ct. 100, 19 L.Ed.2d 90 (1967); *see also Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 880 (7th Cir. 1970) ("we must affirm unless the findings are beyond the pale of sane judgment"), *cert. denied*, 400 U.S. 1020, 91 S.Ct. 584, 27 L.Ed.2d 632 (1971).

NET argues that Edwards's damages calculations relied so heavily on groundless assumptions and were so irrational that the jury should not have been allowed to use them. However, the calculations were introduced and described at trial without any objection from NET. At no time was it asserted that the data and suppositions therein—some of which are now attacked as without support in the record—were in fact entirely unsupported and hence inadmissible for the jury's consideration. Nor was it ever put to the judge, while the trial progressed, that plaintiff's damages calculations, all of which were gathered in a single exhibit, were too inaccurate, incorrect, or irrational, as a matter of law, to form the basis of a supportable jury award. *See Service Auto Supply Co. of Puerto Rico v. Harte & Co.*, 533 F.2d 23, 25 n. 3, 28 (1st Cir. 1976). *See generally Local 901, International Brotherhood of Teamsters v. Compton*, 291 F.2d 793, 796-97 (1st Cir. 1961).

An example of an argument barred by NET's failure to object below is its criticism that the gross per unit profit set forth in plaintiff's damages calculations was not the dealer mark-up on new cars, but instead was reached by dividing the *total* profits of the dealership—from sales of new and used cars, parts, and accessories, as well as service—by the number of new cars sold. The accuracy of this method obviously turns

on whether income from parts, service, etc., rises in direct relation to new car sales. There was little evidence that this was so—although Jay Edwards testified that the two were related[4] and NET did not dispute it. NET now asserts that "[i]t is black letter law that there must be a *factual* basis for a witness' opinion and Mr. Edwards has wholly failed to provide one." Yet no objection was presented to the district court that the assumption of a one-to-one correlation as set out in plaintiff's damages exhibit lacked a sufficient factual predicate to be considered by the jury. Under these circumstances, we are unwilling to say, as a matter of law, that the jury was barred from awarding damages based on that assumption. *See Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 567 (2d Cir. 1970). *Cf. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 518 (10th Cir. 1976) (willing to assume that increased parts and service income would cover increased overhead expenses).[5]

NET also argues that plaintiff never proved that, under the prevailing formula, NET owed it 300 additional cars annually, or that plaintiff could have sold 300 additional cars annually. Both these assumptions were incorporated in the plaintiff's exhibit calculating damages and, as noted, there was never any

4 We note that the bulk of plaintiff's evidence came from the testimony of Mr. Edwards. In particular, it was Edwards who, with the assistance of an accountant, prepared the damages calculations. In giving his opinion as to lost profits, Edwards was acting essentially as an expert witness. It is not unusual for an officer of a corporate plaintiff to testify as to lost profits, and such "evidence is ordinarily held adequate, without more, to make out a case." *See generally* R. Dunn, *Recovery of Damages for Lost Profits* 2d § 7.2 (1981) (collecting cases).

5 Plaintiff may also have been overgenerous to itself in its estimates of increases in overhead expenses resulting from increased volume. However, some deductions were made for overhead expenses. *Compare Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966) (remanding for new trial on damages where no deduction from gross profits made for expenses). *See generally Trabert & Hoefler, Inc. v. Piaget Watch Co.*, 633 F.2d 477, 484 (7th Cir. 1980).

objection that these or any other assumptions in the exhibit lacked a factual predicate sufficient to permit the jury to weigh the exhibit itself. Moreover, there was some, if sparse, evidence in support of each of the two propositions. While NET insists that Dube's higher allocations were the result of Dube's higher sales and lower inventories, there is not much in the record to indicate that this was in fact the case, *see* Part I, *supra*, and the jury was entitled to infer the contrary. The only testimony, from Edwards, was that prior to April 1976, allocations and sales, and therefore inventory as well, were identical for the two dealerships. NET states, however, that even if it really did discriminate against Edwards in favor of Dube, then Edwards should have received 150 of the cars that went to Dube, thus equalizing their allocations. It relies on *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975), for this proposition. But *McGeorge* is factually different—the evidence was clear that there was only a limited number of cars available and that allocations to three other dealers were artificially increased by cars that should have gone to McGeorge. Edwards's theory here, however, was that the allocations to Dube were correct and that, despite NET's denials, NET had surplus cars available with which it could have matched Dube's allocations, or else could have slightly reduced allocations to the other 71 New England dealers. Edwards's support for this proposition consists mainly of his own testimony, but we cannot say the evidence was so negligible as not to constitute a jury question.

NET also argues that even if Edwards had had more cars, it could not have sold them. It points out that Edwards turned down offered cars and at the close of every month had unsold cars on its lot. Jay Edwards offered his own explanation of why offered cars were rejected—essentially, some models were more popular and saleable than others. This was seemingly taken into account in plaintiff's damages calculations by reducing the 300 car figure by the proportion of cars Edwards accepted from among those offered him by NET. Further, Edwards testified that he had sold every car he had ever taken.

Certainly at any given moment, a dealer will have unsold cars on its lot. The jury could have believed this was simply inventory, which did not in itself indicate that the dealer was unable to make sales.

Appellant objects that there was no evidence of unfilled orders or potential customers being turned away. *Cf. Smith v. Babcock Poultry Farms, Inc.*, 469 F.2d 456 (10th Cir. 1972). In a somewhat similar case where this court remanded for a new trial on damages, we commented among other things that the plaintiff had orders for only 25 of the 117 cars it claimed it should have received. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437. That was not the basis of the new trial order there, however, and we cannot say that evidence of unfilled orders is essential, provided there is some other evidence from which a jury might rationally conclude the dealer would have sold extra cars if it had had them. Here there was testimony from Edwards and another dealer that they could have sold an additional 25 cars a month.[6] Moreover, Edwards did testify that a certain number of customers who had placed orders with him withdrew their deposits and purchased cars from Dube instead when Edwards was unable to fill their orders.

6 Evidence of another dealer's performance is admissible. *See, e.g., Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 567 (2d Cir. 1970); *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, 117 N.H. 843, 379 A.2d 798 (1977). NEI argues, however, that this testimony should have been excluded because there was no showing that the two dealerships were sufficiently similar for the comparison to be legitimate. NEI's counsel did object to this brief testimony at trial, but only on the ground of relevancy. He did not specifically contend that the dealerships were geographically so distant as to make them incomparable, a possibility not necessarily apparent. Unlike the situation in *Farmington Dowel Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61, 82 & n. 48 (1st Cir. 1970), here there was little evidence one way or the other as to comparability. Defendant's counsel, in his objection, brought none to the court's attention, nor did he pursue the matter on cross-examination. In these circumstances, we cannot find that the admission of this testimony was error; once admitted, its weight was for the jury to determine. *See* R. Dunn, *Recovery of Damages for Lost Profits* 2d § 5.8 at 234 (1981).

We conclude, taking into account plaintiff's unobjected-to damages exhibit, that there was a sufficient basis in the evidence for the jury's award during the time NET was the regional distributor. Damages for lost profits need not be proved with mathematical certainty, provided an award has a rational basis in the evidence. *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966). Moreover, where the defendant's wrongdoing created the risk of uncertainty, the defendant cannot complain about imprecision. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). As the Tenth Circuit stated in similar circumstances, "[g]iven a finding by the jury that [the distributor] discriminated in the allocation of cars, . . . [the distributor] is in an unfavorable position to complain of an uncertainty created by his own wrongdoing." *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d at 517.

Where plaintiff's testimony and calculations were admitted without objection, their accuracy was a matter for the trier of fact. *See Marquis v. Chrysler Corp.*, 577 F.2d 624, 638-39 (9th Cir. 1978); *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d at 566-67. Defendant's remedy was cross-examination, *see Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d at 446, and it "had every opportunity to cross examine [Edwards] and to expose to the jury any inconsistencies, inadequacies and inaccuracies in [his] testimony," *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 569 (6th Cir. 1981). Indeed, it did so, pointing out forcefully during cross-examination and summation some of the questionable aspects of plaintiff's proof that have been argued before us. Moreover, NET could have presented witnesses and evidence of its own to indicate what the outer limits of Edwards's damages might have been. "It cannot now complain about the jury's reliance on the only evidence on damages which was presented." *Id.* at 569. Nor can it complain that that evidence was legally unacceptable when it did not raise that objection at trial. The jury's award for the period of NET's distributorship, though exceedingly generous, had a sufficient basis in the record.

III. DAMAGES FOR PERIOD AFTER NET CEASED TO BE DISTRIBUTOR

Plaintiff calculated damages, and the jury awarded them, on the basis of an annual 300 car shortage for five years. That period included three years *after* NET had ceased being the distributor and thus had ceased to have any contact whatever with plaintiff. We conclude that to the extent the award was based on the period after March 8, 1978, it cannot stand. Not only is evidence of damage during this period almost nonexistent, but it stands on a different footing from the overall theory of damages in terms of objection at trial.

In contrast to its silent acceptance of the introduction of evidence of plaintiff's general theory of damages, defendant did object to this aspect of plaintiff's proof. On the final day of the trial it moved that "all testimony and exhibits introduced by the plaintiff relative to damages incurred subsequent to March 8, 1978 be stricken." The district judge denied the motion after brief oral argument at the close of evidence. Although the motion to strike might have been made earlier, *see, e.g., Holden v. United States*, 388 F.2d 240, 242-43 (1st Cir.), *cert. denied*, 393 U.S. 864, 89 S.Ct. 146, 21 L.Ed.2d 132 (1968), it was sufficiently timely to allow the trial judge to consider whether this evidence could go to the jury and to preserve NET's rights on appeal.

A plaintiff must establish that the defendant's conduct caused the injury of which it complains. *E.g., Hangar One, Inc. v. Davis Associates, Inc.*, 121 N.H. 586, 590, 431 A.2d 792, 795 (1981). The link between misallocations by NET and those alleged to have occurred after NET left the picture is not obvious, for one would think that TMD, the new distributor, would be responsible for its own allocations. However, Edwards contends now, as it did to the jury, that because NET's willful misallocations reduced its sales, the allocation formula became skewed against it. As a result, incorrect allocations were built into the formula and continued long after NET was the one doing the allocating.

This theory is not necessarily implausible. Testimony at trial suggested that once a dealer's "travel rate" (i.e., his recent sales record) is depressed it may be difficult for him to regain his prior position. *See also Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass.App. 396, 440 N.E.2d 29, 35 n.9 (Mass.App.1982). Assuming that NET did short Edwards cars, the effects could conceivably have been felt after TMD took over the distributorship. However, no evidence was introduced to show that TMD used the same formula as NET. Indeed, the evidence relative to this period was simply insufficient for a rational jury to ascertain that the volume of cars Edwards then obtained constituted a "misallocation" relative to what other comparable dealers were receiving. Significantly, during TMD's distributorship, Edwards's sales steadily *declined* from the level they had reached during NET's distributorship, while, with the exception of 1979, its acceptance rate rose every year, reaching 100 percent in 1981. TMD was thus offering Edwards fewer and fewer cars. Something else was clearly at work during these years besides any residual misallocations from the NET period. In light of the declining sales and allocations, the likelihood that at some point the formula would recover from prior shortages, and the general paucity of meaningful information as to what was happening to other dealers and in the market, we think the jury could not supportably have concluded that Edwards had during these three years continued to be shorted to the extent of 300 cars annually due to prior misconduct of NET.

Even assuming the jury could supportably infer the existence of *some* residual damages, Edwards had an affirmative burden, as plaintiff, to introduce evidence from which their amount could be approximated. *E.g., Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 (1st Cir.1982); *Grant v. Town of Newton*, 117 N.H. 159, 162, 370 A.2d 285, 287 (1977). Instead, Edwards simply asked the jury to assume that the disparity between Dube and itself remained unchanged, that it was shorted 300 cars annually throughout this period, and that all this was somehow due to NET's prior wrongdoing. There is no evidence of what Dube's own actual allocations during this

period were, nor does Edwards suggest any other benchmark against which its allocations can be evaluated. We think the claimed damages left, at this point, the realm of "just and reasonable inference" and entered that of "pure speculation or guesswork." *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1964).

Because the jury so clearly accepted plaintiff's damages calculations, the unjustified portion of the award is easily identified. There can be no dispute as to the amount of these damages: Edwards proved none. *See generally* 6A *Moore's Federal Practice* ¶ 59.08[7] (1983). Calculation of the excess is mechanical. Prorating the 1978 total for the period after March 8 and adding that amount to the figures for 1979-1981 gives a sum of $951,387.16, which we round down to $950,000. Accordingly, we order the award of damages reduced by that amount. We remand to the district court for recalculation of prejudgment interest on the remaining sum, the damages being deemed to have occurred between April 1976 and March 8, 1978.

IV. EVIDENTIARY RULINGS

At trial, plaintiff introduced evidence that the brother of NET's chairman had been convicted of warranty fraud at his Chevrolet dealership and lost his Toyota dealership as a result. The asserted relevance of this evidence was that NET's patience with the brother was so much greater than with Edwards, who was sent a termination letter in circumstances far less grave, that it tended to show bad faith on the part of NET in its dealings with Edwards.

Had NET objected on grounds of prejudice, *see* Fed.R.Evid. 403, we might have questioned the admission of this evidence. The only stated ground of objection was relevancy, however, and we cannot say that the termination was completely irrelevant. As the objection failed to alert the trial court to the prejudice theory, we will not review that argument here. *See Bryant v. Consolidated Rail Corp.*, 672 F.2d 217, 220 (1st Cir.1982); *see generally Brookhaven Landscape & Grading Co.*

v. J.E. Barton Contracting Co., 676 F.2d 516, 573 (11th Cir.1982); 1 *Weinstein's Evidence* ¶ 103[02] at 103-21 to 103-22 (1982).

Appellant also claims that the district court admitted prejudicial hearsay testimony regarding the Federal Trade Commission's refusal to take action on a complaint lodged with it by the Alliance. Jay Edwards stated that an FTC employee had told the Alliance's lawyer, who had told Edwards, that the FTC was staying its hand because a private class action against NET was pending. NET's nonspecific objection at trial was overruled. It now asserts that this was inadmissible hearsay, and prejudicial in that it created the impression that 1) the FTC believed NET was guilty, and 2) that NET was in constant trouble with its dealers. We agree that, as an initial matter, the statement would not have been admissible. However, we conclude that it was cumulative and harmless. *See deMars v. Equitable Life Assurance Society of the United States*, 610 F.2d 55, 62 (1st Cir.1979). The day before Edwards gave the testimony of which NET complains, he gave substantially identical testimony, without objection, while being questioned by defense counsel. Moreover, as discussed below, there was extensive other evidence of poor relations between NET and its dealers.

NET also claims that the district court erred in admitting arguably prejudicial testimony and correspondence concerning disputes between NET and five other dealers. Four were directors of the Alliance (which seems to have had only a handful of directors) and the fifth a member. The court ruled at the pretrial conference that it would allow this evidence over NET's objection. The other dealers did not testify that they were shorted cars, but did describe harsh treatment by NET after formation of the Alliance and its protests against NET. Two Alliance directors were sent termination letters, subsequently withdrawn; NET commenced a warranty investigation of the third; and it sent a somewhat threatening letter objecting to the location of the fourth. (An identical letter, sent to the fifth dealer, was also introduced.) NET contends that this was

impermissible evidence of other wrongs, *see* Fed.R.Evid. 404, and was in any event unduly prejudicial, *see id.* 403.*

We do not think this evidence simply portrayed unrelated "bad acts" (NET in fact denies that the conduct was improper at all). *See* Advisory Committee Notes to Rule 404(b). Rather, by suggesting a pattern of retaliatory practices against Alliance members, it was probative of NET's motive and intent, and its possible bad faith, in dealings with Edwards. *See Bob Maxfield Motors, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1039 (5th Cir.) (misallocation), *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981); *Miller v. Poretsky*, 595 F.2d 780, 784-85 (D.C.Cir.1978) (evidence of past racial discrimination by defendant landlord admissible in Fair Housing Act action); *id.* at 790-91 & n. 12 (Robinson, J., concurring). The district court was entitled to conclude, without abusing its discretion, that the permissible probative value of the evidence outweighed any prejudice. *See generally Dente v. Riddell, Inc.*, 664 F.2d 1, 5 (1st Cir.1981).

Finally, the district court refused to allow NET to introduce evidence from its own records that Dube's and Edwards's sales for January through March of 1976 were not as close as Edwards claimed. That evidence, as the court said, was "basic and critical . . . in explaining and justifying [NET's] allocations to its dealers." The court held, however, that these records should have been produced during discovery and could not be sprung on the plaintiff at the last minute. The court did not abuse its discretion in excluding this evidence. The parties had entered into a pretrial agreement as to the exhibits they

* Appellee argues that NET stated its objection as "relevance" during the pretrial conference and therefore waived any other argument. A fair reading of the transcript, however, refutes this contention. NET's counsel stated that the proffered evidence was "an effort to prove that defendants did something by showing that they did the same alleged activities to someone else, which is normally not permitted except in narrow areas." Defendant's motion in limine contended that "experiences of other dealers are not relevant, and reference to them is designed to invoke an improper inference regarding defendant's treatment of the plaintiff."

were to present. The agreement did not include this evidence. It was within the discretion of the district court to hold the parties to compliance with the pretrial stipulation. *See Newman v. A.E. Staley Manufacturing Co.*, 648 F.2d 330, 333 (5th Cir.1981); *United States v. Rayco, Inc.*, 616 F.2d 462, 464 (10th Cir.1980); *Simonsen v. Barlo Plastics Co.*, 551 F.2d 469, 471 & n. 3 (1st Cir.1977).

V. MOTION FOR NEW TRIAL

Except with respect to the damages awarded for the period after March 8, 1978, the verdict was not so clearly against the weight of the evidence as to constitute a manifest miscarriage of justice requiring a new trial. "The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980) (per curiam), and we cannot say that discretion was abused here. *See Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196, 200 (1st Cir.1980).

NET's motion for a new trial was based not only on the arguments already considered but also on newly discovered evidence and an accompanying affidavit from a former NET vice-president. The affiant stated that when NET lost its distributorship it ceased operations, its records were dispersed, and many of its personnel took employment elsewhere, making it impossible to track down all the relevant documents. Following the return of the large verdict against NET, the affiant was roused to action and was able to find computer sheets showing that the allocations to Dube and Edwards were in fact equivalent in that each dealer was provided with a more or less equal days' supply of cars. Because Dube's inventory was lower and sales rate higher, allocations to it were greater. The affiant is "convinced that the information contained in the documents in question conclusively answers the plaintiff's contentions regarding misallocations, and that such contentions could not effectively be answered without this material."

A motion for new trial on the ground of newly discovered evidence will generally be granted only where the movant was

excusably ignorant of the facts despite exercising due diligence to uncover them. *See generally* 11 Wright & Miller, *Federal Practice and Procedure* § 2808 (1973). We cannot be impressed by the diligence of a party that fails to uncover evidence during four years of discovery that it manages to retrieve four weeks after losing the lawsuit. Moreover, this is not significantly new evidence. Allocations were based on sales and inventory. Both these figures appear in the financial records of the dealerships and so were, or should have been, known at the time of trial. In addition, the sales records, at least, were available in NET's records. *See* page 824, *supra*. Thus, appellant now seeks to rely on information that has been available to it all along by presenting it in a new format.[8] Indeed, appellant explicitly argues that other materials, known at the time of trial, prove that the allocations were proper. Thus, the computer printouts, according to appellant, reveal nothing not already known. This is not the sort of "newly discovered" evidence that requires a new trial. *See Owens v. International Paper Co.*, 528 F.2d 606, 611 (5th Cir.1976).

The judgment is reduced by the sum of $950,000 and, as so reduced, is affirmed. The case is remanded for recalculation of prejudgment interest consistent herewith.

[8] Armed with the sales and inventory figures from the financial records of the dealerships, counsel might perhaps have been able to calculate what the allocations should have been under the NET formula. If so, it could have presented the jury with exactly the sort of evidence on the basis of which it seeks a new trial.

APPENDIX B

Judgment of the District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action File No. 78-49-D

JAY EDWARDS, INC.

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Irving Hill Senior, United States District Judge, Sitting by Designation, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff.

It is Ordered and Adjudged that damages are assessed in the sum of One Million Four Hundred Nineteen Thousand Four Hundred Sixty Two ($1,419,462.00).

Dated at Concord, this 22nd day of April, 1982.

s/ WILLIAM H. BARRY
Clerk of Court

cc: Daniel Lauter, Esq.
William L. Cowin, Esq.
James C. Wheat, Esq.

APPENDIX C

Amended Judgment of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

No. Civil 78-49-D

JAY EDWARDS, INC.,

Plaintiff,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., et al.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND JUDGMENT TO INCLUDE PREJUDGMENT INTEREST

Pursuant to jury verdict, judgment was entered on April 22, 1982, for Plaintiff in the amount of $1,419,462. By letter to the Clerk dated May 3, 1982, Plaintiff's counsel moved to amend the judgment by adding to the amount of the jury verdict the sum of $595,396.17. That sum was calculated by computing interest at straight 10% per annum not compounded from the date of filing the complaint, February 10, 1978, to the date of the jury verdict, April 22, 1982. The addition of this sum to the judgment is sought by virtue of a New Hampshire statute, RSA 524:1-b, which provides that an interest allowance shall be included in all judgments in all civil proceedings in which pecuniary damages are recovered.

Defendant does not dispute that the New Hampshire statute applies to the instant award. Defendant does not dispute that the judgment should now be amended to provide for interest thereunder.

Defendant's sole objection to the motion is as to the method of computing the award.

Defendant asserts that the correct amount of prejudgment interest is $429,997.37.

By letter to the Clerk of June 1, 1982, Plaintiff accedes to the amount as suggested by Defendant.

THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Plaintiff's motion is granted. The judgment shall be amended *nunc pro tunc* to April 22, 1982, by adding to the amount of the jury verdict the additional sum of $429,997.37 as prejudgment interest. The total judgment as amended will thus be $1,849,459.37.

2. The Clerk shall transmit a copy of this Order by United States mail to counsel for both sides.

DATED: June 2, 1982, at Anchorage, Alaska.

/s/ IRVING HILL

Irving Hill, Judge
United States District Court
Sitting by Designation

cc: Howard B. Myers, Esq.
James C. Wheat, Esq.
William I. Cowin, Esq.

APPENDIX D

Order of the District Court Denying Motion for New Trial

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

No. Civil 78-49-D

JAY EDWARDS, INC.,

Plaintiff,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL TREATED AS ALTERNATIVE MOTION FOR NEW TRIAL, FOR JUDGMENT N.O.V. OR MOTION FOR REMITTITUR

Defendants' motion denominated "MOTION FOR NEW TRIAL" filed in the District Court for the District of New Hampshire under date of April 29, 1982, has come before the Court. The Court notes that the relief sought in said motion is in the alternative and includes, the granting of a new trial, judgment N.O.V., or remittitur. The Court treats the motion as an alternative one seeking all three types of relief. The Court has read and considered said motion together with Defendants' evidentiary material and memorandum of Points and Authorities in support thereof. No hearing is necessary or appropriate. Plaintiff is not required to file any further briefing or evidentiary material in opposition to said motion.

IT IS ORDERED AS FOLLOWS:

1. Said motion is denied in all respects.

2. The Clerk of the U.S. District Court for the District of New Hampshire shall transmit a copy of this Order by United States mail to counsel for both sides.

DATED: May 17, 1982, at Los Angeles, California.

/s/ IRVING HILL

Irving Hill, Judge
United States District Court

cc: Daniel Laufer, Esq.
William I. Cowin, Esq.
James C. Wheat, Esq.

APPENDIX E

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1539

JAY EDWARDS, INC.,
Plaintiff, Appellee,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,
Defendant, Appellant.

JUDGMENT

Entered: May 19, 1983

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reduced by the sum of $950,000.00 and, as so reduced, is affirmed and the cause is remanded to that Court for recalculation of prejudgment interest consistent with the opinion filed this day.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

APPENDIX F

Statute

STATUTE

N.H. REV. STAT. ANN. § 357-C (Supp. 1982)

357-C:3 Prohibited Conduct. It shall be deemed an unfair method of competition and unfair and deceptive practice for any:

> I. Manufacturer, factory branch, factory representative, distributor, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of such parties or to the public.
>
> • • • •
>
> III. Manufacturer; distributor; distributor branch or division; factory branch or division; or any agent thereof to:
>
> (a) Refuse to deliver in reasonable quantities and within a reasonable time after receipt of dealer's order, to any motor vehicle dealer having a franchise or contractual arrangement for the retail sale of new motor vehicles sold or distributed by such manufacturer, distributor, distributor branch or division, or factory branch or division, any motor vehicles covered by such franchise or contract and specifically advertised by such manufacturer, distributor, distributor branch or division, or factory branch or division, to be available for immediate delivery; provided, however, that the failure to deliver any motor vehicle shall not be considered a violation of this subparagraph if such failure is due to an act of God, work stoppage or delay due to strike or labor difficulty, shortage of materials, freight embargo, or other cause over which the manufacturer, distributor, or any agent thereof, shall have no control.